

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HUSKY INTERNATIONAL TRUCKS, INC.,

Plaintiff,

V.

NAVISTAR, INC., et al.,

Defendants.

CASE NO. C10-5409BHS

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court on Defendants' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Dkt. 10. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants Defendants' motion for the reasons stated herein.

I. PROCEDURAL BACKGROUND

On May 11, 2010, Plaintiff Husky International Trucks, Inc. (“Husky”) filed its complaint in Pierce County Superior Court alleging that Defendants violated RCW 19.86.020 and 19.86.030 and that Defendants’ conduct breached their express and implied obligations to Husky which caused injury to Husky’s business and property. Dkt. 1, Exh. A. On June 10, 2010, Defendants filed their notice of removal in this Court. Dkt. 1. On June 24, 2010, Defendants filed their motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Dkt. 10. On July 12, 2010, Husky responded (Dkt. 14) and on July 16, 2010, Defendants replied (Dkt. 16). On August 13,

1 2010, Husky filed a motion for leave to file its amended complaint (Dkt. 17) and its
 2 amended complaint (Dkt. 18). On August 17, 2010, the Court issued an order stating that
 3 Defendants' motion to dismiss would be decided after the Court ruled on Husky's motion
 4 for leave to amend. Dkt. 19. On August 23, 2010, Husky withdrew its motion for leave
 5 to amend. Dkt. 20. Thus, Defendants' motion to dismiss (Dkt. 10) is now before the
 6 Court.

7 **II. HUSKY'S COMPLAINT**

8 **A. Factual Allegations**

9 Navistar manufactures and sells Medium and Heavy-duty trucks
 10 under the International brand name. The company was formed in 1902 and
 sells its products through a network of dealers.

11 Husky is a Navistar dealer selling International brand Medium and
 12 Heavy Duty trucks. Navistar entered into a Dealer Sales/Maintenance
 13 Agreement with Husky in August 1987. Husky's three year average sales
 14 of International brand Medium Trucks is 139 and Heavy Duty Trucks is 166
 of which, 35 are Severe Service Heavy Trucks. The State of Washington
 normally is a purchaser of all these types of trucks.

15 Prior to 2006, Pacific Coast Truck Center (PCTC), the former
 16 independent International Truck Dealer in Tacoma, had been the only
 17 International Truck Dealer to bid to the State of Washington. Husky did not
 18 bid because when PCTC delivered a truck in Husky's Area of
 Responsibility (AOR), PCTC gave Husky the International Delivery to User
 (DTU) credit and a portion of the sales profit. The sale need not be directly
 to a state agency; rather, it could come from any local government electing
 to purchase a truck off the State of Washington bid.

19 On or about August 30, 2006, Cascadia International LLC, a
 20 Delaware for profit company, was created, and it operates an office in
 21 Tacoma. On information or belief, Husky alleges that Cascadia is a
 22 Navistar Deal Cor operation with all the voting stock being held by
 23 Navistar. Washington State Corporation Division records indicate that
 Cascadia's managers are Larry Wake, C. Green Paul Grzemski, and Jeffrey
 Bowen, all having an address of Warrenville, Illinois, the home office of
 Navistar. On information or belief, Husky alleges that they are employees
 and managers of Navistar.

24 On August 18, 2008, Husky sent Navistar a letter that complained
 25 about unfair and deceptive acts and practices or unfair methods of
 26 competition being committed by Navistar through its Deal Cor Dealer
 Cascadia International LLC. The acts included hiring Husky employees,
 27 who had access to Husky's proprietary and confidential information.
 Husky believes that Navistar through its Deal Cor Dealer has
 misappropriated and used this information and has engaged in this and other
 unfair and deceptive acts and practices and unfair methods of competition

1 which are not referenced in the August 18, 2008 letter, including acts which
 2 occurred after the letter was sent.

3 Almost a year after Husky had sent the August 2008 letter, the
 4 Washington State Department of General Administration issued on July 23,
 5 2009 an Invitation for Bid regarding Various Cab & Chassis – including
 6 Hybrids for an agreement known as Contract No. 02709. The invitation
 7 solicited bids for the purchase of over 172 trucks which could be satisfied
 8 by International brand trucks. The bids, for a three-year contract, were to
 be used by the Washington State Department of Transportation (WSDOT).
 The contract, however, could also be used by all members of the
 Washington State Purchasing Cooperative which were authorized to utilize
 the contract. The projected purchases by WSDOT over the contract's term
 are estimated to be approximately \$28,500,000 based on purchases already
 made in the first quarter of 2010 and annualized for the three-year term.

9 The bids were initially due on August 13, 2009 but the bid date was
 10 extended to August 27, 2009. Prior to the date for the submission of bids,
 11 Navistar informed Husky that Navistar would give Cascadia International
 12 LLC a Special Price Allowance (SPA) for the trucks and not give the same
 13 SPA to Husky. On August 5, 2009, Husky's counsel sent Navistar's
 14 counsel a letter that objected to the proposed price discrimination through
 15 variances in the SPA between dealers. Although it had taken action to
 16 equalized the SPAs in the past, Navistar failed to respond to Husky's
 17 objection.

18 Husky and Cascadia both submitted bids. Public records reflect a
 19 total of five bids were received. The bid results indicate that Cascadia's bid
 20 was substantially lower than Husky's in most categories. The contract was
 21 awarded to Cascadia on October 14, 2009. Cascadia's price was lower than
 22 Husky's cost to purchase the same trucks from Navistar, because Navistar
 23 authorized SPAs to sell the trucks to Cascadia substantially higher than the
 24 SPAs given to Husky.

25 Husky and Cascadia are direct competitors. Higher SPAs and
 26 special marketing allowances repeatedly granted to Cascadia create a
 27 substantial competitive disadvantage to Husky, impairing its ability to
 compete. On information or belief, Husky alleges that Cascadia has sold to
 local government entities and Truck Original Equipment Manufacturers
 (TEMs) International branded trucks using State Bid discounts to the entity
 when the entity was not entitled to such discounts. This was and is to the
 detriment of Husky. Navistar's practices have caused Husky to lose
 customers and profits, injured its business and property, and resulted in
 damages and are in restraint of trade.

28 To gain and misappropriate confidential information such as
 29 customer lists, customer contact information, pricing strategies, and
 30 Husky's three-year growth plan, Cascadia offered key individuals lucrative
 31 financial packages to leave Husky and work for Cascadia. They were
 32 successful with Chris Stephens in April 2007, who was Husky's leading
 33 leasing salesperson. In April of 2007, they hired John Grusz, Husky's sales
 34 manager since 1985 making him General Manager. In November of 2009,
 35 they hired Bob Radowick, a Husky journeyman parts salesperson since
 36 1985, for a parts position.

1 Dkt. 1 at 9-12 (paragraph numbers and footnotes omitted).

2 **B. Husky's Claims**

3 Based on the above factual allegations, Husky alleges that Navistar's conduct is an
 4 unfair or deceptive act or practice in violation of RCW 19.86.020 and 19.86.030 and has
 5 caused injury to Husky's business and property. Dkt. 1 at 12. In addition, Husky alleges
 6 that Navistar's conduct breached its express and implied contractual and promissory
 7 obligations to Husky and has caused injury to Husky's business and property. *Id.*

8 **III. DISCUSSION**

9 **A. Standard for Deciding Motions to Dismiss Under Rule 12(b)(6)**

10 Motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil
 11 Procedure may be based on either the lack of a cognizable legal theory or the absence of
 12 sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Department*, 901
 13 F.2d 696, 699 (9th Cir. 1990). A court accepts the factual allegations in the complaint as
 14 true for purposes of deciding the motion to dismiss. *Id.* To survive a motion to dismiss,
 15 the complaint does not require detailed factual allegations but must provide the grounds
 16 for entitlement to relief and not merely a "formulaic recitation" of the elements of a cause
 17 of action. *Bell v. Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) "Factual
 18 allegations must be enough to raise a right to relief above the speculative level, on the
 19 assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.*
 20 at 555-56 (internal citations omitted). Plaintiffs must allege "enough facts to state a claim
 21 to relief that is plausible on its face." *Id.* at 570.

22 **B. Husky's Claim Under RCW 19.86.020**

23 Washington's Consumer Protection Act ("CPA") governing unfair competition
 24 and unfair, deceptive, and fraudulent acts or practices, states:

25 The legislature hereby declares that the purpose of this act is to
 26 complement the body of federal law governing restraints of trade, unfair
 27 competition and unfair, deceptive, and fraudulent acts or practices in order
 28 to protect the public and foster fair and honest competition. It is the intent
 of the legislature that, in construing this act, the courts be guided by final
 decisions of the federal courts and final orders of the federal trade

commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

It is, however, the intent of the legislature that *this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.*

RCW 19.86.020 (emphasis added). To prevail in a private CPA suit, “the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person’s business or property, and (5) causation.” *Panag v. Farmers Ins. Co. of Washington*, 166 Wn. 2d 27, 37 (2009) (citing *Hangman Ridge Stables v. Safeco Title Ins. Co.*, 105 Wn. 2d 778, 784 (1986)). In *Panag*, the Washington Supreme Court explained in a footnote that “[a] CPA claim may be predicated on either a per se violation of the statute or on deceptive practices unregulated by statute but involving the public interest.” 166 Wn. 2d at 37 (citing *Anhold v. Daniels*, 94 Wn. 2d 40 (1980)). In *Hangman Ridge*, the court stated that the first two elements of a CPA claim “may be established by a showing that (1) an act or practice which has a capacity to deceive a substantial portion of the public (2) has occurred in the conduct of any trade or commerce [or] by a showing that the alleged act constitutes a per se unfair trade practice.” 105 Wn. 2d at 785-86.

1. Application of the “substantial portion of the public test” to unfair competition claims

Husky argues that “[t]he ‘deceive a substantial portion of the public’ standard does not apply in this case.” Dkt. 14 at 6. In support of this argument Husky quotes from the unpublished opinion in *Seven Gales Corp. v. Sterling Recreation Org. Co.*, 1987 WL 56622 (W.D. Wash. June 25, 1987), in which the court held that “‘a capacity to deceive’ is not a requirement under the portion of [RCW 19.86.020] which forbids unfair methods of competition. This is clear from the language of the statute and from relevant case

precedent.” *Seven Gables*, 1987 WL 56622 at *10. The court in *Seven Gables* further explained in a footnote that

The unfair methods of competition provision of RCW 19.86.020 is taken verbatim from section 5(a)(1) of the Federal Trade Commission Act, 15 USC § 45(a)(1), and federal precedent under section 5(a)(1) therefore provides guidance for deciding what kind of conduct may constitute an “unfair method of competition.”

1987 WL 56622 at *10 n.28 (citing *State v. Black*, 100 Wn.2d 793, 799 (1984)).

While § 5(a)(1) of the Federal Trade Commission Act may provide guidance as to what conduct can be considered an unfair method of competition, in *Black* the Washington Supreme Court analyzed what constitutes unfair methods of competition under RCW 19.36.020. The court stated that:

[T]he phrase “unfair methods of competition” has never been defined by this court. The United States Supreme Court has said that the term can be defined only by “the gradual process of judicial inclusion and exclusion.” *FTC v. Raladam Co.*, 283 U.S. 643, 648 (1931). . . . The *Raladam* Court adopted a standard of substantial injury to or tendency to injure the business of a competitor. *Id.* at 652.

* * *

We choose, however, not to adopt the federal court definition of unfair method of competition.

In passing the Consumer Protection Act, the Legislature specifically recognized that acts or practices which are reasonable business practices or *which are not injurious to the public* are *not* the kind of acts sought to be prohibited. RCW 19.86.020. This consideration, which is not part of the federal statutory scheme, warrants a narrower interpretation of the words “unfair method of competition” than that given by federal court.

Blake, 100 Wn. 2d at 801-803 (emphasis added).

Defendants argue that the holding in *Seven Gables* is incorrect and that the “substantial portion of the public test” applies to all claims brought under 19.86.020. Dkt. 16 at 8-11. The Court agrees. The Washington Supreme Court clearly held in *Black* that the legislature narrowed the application of RCW 19.86.020 by requiring that an act or practice be injurious to the public in order to constitute a claim under the statute. Thus, the court concluded that this narrowing deviates from the federal statutory scheme and “warrants a narrower interpretation of the words ‘unfair method of competition’ than that given by federal court.” *Blake*, 100 Wn. 2d at 803.

1 In *Buffets, Inc. v. Klinke*, 73 F.3d 965 (9th Cir. 1996), the Ninth Circuit applied the
2 “substantial portion of the public” test when it granted the defendants’ motion for
3 summary judgment on the plaintiffs’ claim for unfair competition under RCW 19.86.020.
4 73 F.3d at 970. The plaintiffs alleged that the defendants had improperly acquired their
5 employee manual and recipes in violation of Washington’s CPA. *Id.* at 966-67. The
6 Ninth Circuit based its decision on the plaintiffs’ inability to show that additional
7 plaintiffs had been or would be injured by the defendants’ conduct, however unethical, in
8 the exact same fashion as the plaintiffs were injured. *Id.* at 970.

9 Based on the Washington Supreme Court decisions in *Blake* and *Hangman Ridge*,
10 the Ninth Circuit’s decision in *Buffets*, as well as a plain reading of the statute, the Court
11 concludes that the “substantial portion of the public” test applies to all claims brought
12 under RCW 19.86.020.

13 **2. Application of the “substantial portion of the public” test to Husky’s
14 claim**

15 Husky maintains that even if the “substantial portion of the public” test applies to
16 its RCW 19.86.020 claim, the test is satisfied because

17 the pricing and allowance conduct, the confidential information and related
18 unfair acts and unfair methods of competition, directly injure Husky and
Motor Trucks (the two International dealers) and injure private purchasers
of the products, the state and local governments that purchase those
products and thereby the taxpayers and general public.

19 Dkt. 14 at 6.

20 Defendants argue that Husky cannot satisfy the “substantial portion of the public”
21 test as a matter of law. Defendants assert that based on *Buffets* and *LaFrance*, Cascadia’s
22 hiring of three of Husky’s employees who allegedly misappropriated confidential
23 information cannot be considered to be directed at a substantial portion of the public. Dkt.
24 16 at 11. Defendants also contend that Husky’s assertion in its response to the motion
25 that its RCW 19.86.020 claim is also based on Navistar’s pricing to Cascadia is without
26 merit. *Id.* at 11-12. First, as argued below with respect to Husky’s RCW 19.86.030
27 claim, a parent’s pricing to its wholly-owned subsidiary is not subject to price

1 discrimination/unfair business practices claims because a parent and its subsidiary are
2 treated as one single entity for such purposes. *Id.* at 12. Moreover, Defendants maintain
3 that the DOT, and thus the taxpayers, received a lower price which thereby benefits
4 taxpayers and fails to show an injury to the substantial portion of the public. *Id.* Rather,
5 the only injury Husky has shown is its own in not being awarded the DOT contract. *Id.*

6 The Court agrees with Defendants that Husky has failed to satisfy the “substantial
7 portion of the public” test. In *Buffets*, the Ninth Circuit held that the injuries to the
8 plaintiffs and the industry in general, based on the defendants’ improper acquisition of
9 plaintiffs’ recipes and employee manual, were insufficient to constitute an injury to a
10 substantial portion of the public and therefore did not support a claim under RCW
11 19.86.020. 73 F.3d at 970. The same reasoning applies here. Husky fails to show how
12 Defendants’ conduct, in hiring Husky’s former employees, has the capacity to injure a
13 substantial portion of the public in the exact same fashion as Husky was injured. *See*
14 *Buffets*, 73 F.3d at 970. In addition, Husky cannot show that Navistar’s conduct in
15 providing SPAs to Cascadia, Navistar’s subsidiary, supports a claim under RCW
16 19.86.020. *See infra* Section III.C; *see* Complaint, Dkt. 1, ¶ 2 (“Navistar owns and
17 operates Cascadia”). Regardless, as argued by Defendants, Husky has failed to show how
18 a substantial portion of the public was injured by such conduct when it resulted in a lower
19 price to the government to purchase International trucks. Therefore, the Court concludes
20 that Defendants’ motion to dismiss Husky’s RCW 19.86.020 claims is granted.

21 **C. Husky’s Claim Under RCW 19.86.030**

22 “Every contract, combination, in the form of trust or otherwise, or conspiracy in
23 restraint of trade or commerce is hereby declared unlawful.” RCW 19.86.030. In *Black*,
24 the Washington Supreme Court explained that “RCW 19.86.030 prohibiting contracts or
25 conspiracies in restraint of trade is our State’s equivalent of section 1 of the Sherman
26 Antitrust Act, 15 U.S.C. § 1.” 100 Wn. 2d at 967. In 1984, the United States Supreme
27
28

1 Court decided the case of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752
 2 (1984). The Third Circuit's summary of the holding in *Copperweld* is instructive:

3 The [*Copperweld* court] considered the scope of Sherman Act § 1's word
 4 "conspiracy." It held that the word did not cover an agreement between a
 5 wholly owned subsidiary and its parent, because a wholly owned subsidiary
 6 could not "conspire" with the parent. That, the Court said, is because they
 7 have "a complete unity of interest. Their objectives are common, not
 8 disparate; their general corporate actions are guided or determined not by
 9 two separate corporate consciousnesses, but one . . . [And] [t]hey share a
 10 common purpose whether or not the parent keeps a tight rein over the
 11 subsidiary. . . ." *Id.* at 771. The Court added that a "corporation has
 12 complete power to maintain" a portion of the enterprise either in the form of
 13 an unincorporated division, or in the form of a separately incorporated
 14 subsidiary. But, the "economic, legal, or other considerations that lead
 15 corporate management to choose one structure over the other are not
 16 relevant to whether the enterprise's conduct seriously threatens
 17 competition." *Id.* at 772. For these reasons, the Court held, "the
 18 coordinated activity of a parent and its wholly owned subsidiary must be
 19 viewed as that of a single enterprise for purposes of § 1 of the Sherman Act.
 20 *Id.* at 771.

21 *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 749 (1st
 22 Cir. 1994).

23 Defendants maintain that under *Copperweld*'s single-seller rule, a parent
 24 company's dealings with a subsidiary cannot, as a matter of law, constitute an illegal
 25 conspiracy, and that Navistar and Cascadia must be treated as a single entity for purposes
 26 of antitrust price discrimination. Dkt. 10 at 15-16. Thus, according to Defendants,
 27 Husky's RCW 19.86.030 price discrimination claim must fail because "no price
 28 discrimination can arise from the exchange of goods between a parent company and its
 29 subsidiaries because no 'sale' occurs. Rather a non-sale 'transfer' is deemed to take place
 30 for purposes of price discrimination analysis." *Id.* at 16. In support of their argument,
 31 Defendants cite to a Ninth Circuit case in which the court affirmed the district court's
 32 summary judgment dismissal of a price discrimination claim because the transaction at
 33 issue was between a parent and its subsidiary and therefore the price paid to the parent
 34 was "a transfer price, not a sale." *Rebel Oil Co. v. Atlantic Richfield Co.*, 146 F.3d 1088,
 35 1096 (9th Cir. 1998).

1 Husky argues that there is a factual question as to whether Cascadia is operating as
 2 a “bona fide subsidiary” and that the Court should allow additional discovery on the issue
 3 to decide whether Cascadia and Navistar should be treated as a single economic unit.
 4 Dkt. 14 at 10-11. In addition, Husky contends that transactions between subsidiaries
 5 could be sales. *Id.* at 11 (citing *Zoslaw v. MCA Distrib. Co.*, 693 F.2d 870 (9th Cir.
 6 1982)).

7 Although Husky makes the argument that Cascadia is not a “bona fide subsidiary”
 8 (Dkt. 14 at 10), it does not dispute that it is owned and operated by Navistar. *See* Dkt. 1,
 9 ¶ 2. Rather, Husky appears to argue that under the “dominion and control” test, Navistar
 10 does not assert sufficient control over Cascadia to preclude a pricing discrimination claim
 11 based on Navistar’s pricing to Cascadia. Dkt. 14 at 10-12.

12 The Court concludes that Husky’s price discrimination claims under RCW
 13 19.86.030 must fail because Cascadia is a subsidiary of Navistar. The courts in
 14 *Copperweld* and *Rebel Oil*, both decided after the Ninth Circuit case cited to by Husky,
 15 recognize that entities in a parent/subsidiary relationship are treated as a single economic
 16 unit. *Copperweld*, 467 U.S. at 771; *Rebel Oil*, 146 F.3d at 1096. Neither of those cases
 17 recognize the theory advanced by Husky that a “dominion and control” test should be
 18 applied to determine whether Cascadia is operating as a bona fide subsidiary. *See* Dkt. 14
 19 at 10-11. Thus, the SPA given to Cascadia by Navistar was in fact a transfer, not a sale,
 20 and cannot constitute a conspiracy as it was given by a parent to its subsidiary.
 21 Therefore, the Court concludes that Defendants’ motion to dismiss Husky’s RCW
 22 19.86.030 claims is granted.

23 **D. Husky’s Contract Claim**

24 In *Berg v. Hudesman*, 115 Wn. 2d 657, 666 (1990), the Washington Supreme
 25 Court “adopted the ‘context rule’ and recognized that intent of the contracting parties
 26 cannot be interpreted without examining the context surrounding an instruments’s
 27 execution.” *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn. 2d 493, 502
 28

1 (2005) (explaining the holding in *Berg*). The court concluded in *Berg* that extrinsic
 2 evidence was admissible to aid in understanding the parties' intent with respect to a
 3 specific term in their contract. 115 Wn. 2d at 672.

4 Since *Berg*, the Washington Supreme Court has sought to clarify that the holding
 5 in that case did not authorize an unrestricted use of extrinsic evidence in contract analysis.
 6 *Hollis v. Garwall, Inc.*, 137 Wn. 2d 683, 693 (1999). In *Hearst*, the court explained that:

7 surrounding circumstances and other extrinsic evidence are to be used "to
 8 determine the meaning of *specific words and terms used*" and not to "show
 9 an intention independent of the instrument" or to "vary, contradict or
 10 modify the written word." *Id.* at 695-96 (emphasis added). *See also U.S.*
11 Life Credit Life Ins. Co. v. Williams, 129 Wn. 2d 565, 571 (1996) (court's
 12 intention in adopting the "context rule" was not "to allow such evidence to
 13 be employed to emasculate the written expression of" the meaning of the
 14 contract's terms); *In re Marriage of Schweitzer*, 132 Wn. 2d 318, 327
 15 (1997) ("context rule" cannot be used to show intention independent of the
 16 instrument); *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73 (2003)
 17 (admissible extrinsic evidence does *not* include evidence of a party's
 18 unilateral or subjective intent as to contract's meaning).

19 Our holding in *Berg* may have been misunderstood as it implicates
 20 the admission of parol and extrinsic evidence. We take this opportunity to
 21 acknowledge that Washington continues to follow the objective
 22 manifestation theory of contracts. Under this approach, we attempt to
 23 determine the parties' intent by focusing on the objective manifestations of
 24 the agreement, rather than on the unexpressed subjective intent of the
 25 parties. We impute an intention corresponding to the reasonable meaning
 26 of the words used. Thus, when interpreting contracts, *the subjective intent*
27 of the parties is generally irrelevant if the intent can be determined from the
actual words used. We generally give words in a contract their ordinary,
 28 usual, and popular meaning unless the entirety of the agreement clearly
 demonstrates a contrary intent. *We do not interpret what was intended to be*
written but what was written.

20 *Hearst*, 154 Wn. 2d at 503-04 (internal citations omitted) (emphasis added).

21 Here, Husky and Navistar entered into a Dealer Sales/Maintenance Agreement (the
 22 "Contract") on August 20, 1987. Dkt. 11-2. The Contract states in pertinent part:

23 (iv) Trade Area refers to the non-exclusive geographical area which
 24 may be assigned to the Dealer [*i.e.*, Husky] by Navistar, and changed by
 25 Navistar from time to time, considered as the Dealer's primary area of
 26 responsibility for the sales of goods covered by the Agreement.
 27 * * *

28 4. Prices, discounts and terms applying to the goods ordered by the
 29 Dealer shall be those established by Navistar and in effect on the date of
 30 shipment of goods to the Dealer. Such prices, discounts and terms shall be
 31 subject to the conditions stated in the applicable Schedules of Discounts and
 32 Terms.

* * *

1 11. The Dealer recognizes and understands that Navistar reserves
 2 the right to sell, lease, or loan the goods covered by the Agreement for use
 3 in the Dealer's Trade Area to:

* * *

4 (b) State or local governments and any department or agency
 5 thereof;

6 (c) Dealers of distributors of Navistar for use by such dealers or
 7 distributors in the operation of their business;

* * *

8 The Dealer also recognizes and understands that Navistar reserves
 9 the right to sell, lease or loan the goods covered by the Agreement through:

10 (a) Navistar-owned retail outlets wherever located; and

11 (b) Other dealers of Navistar wherever located.

12 Dkt. 11-2 at 4, 5, & 10.

13 Husky's complaint seeks relief for breach of implied and express contractual
 14 obligations. Dkt. 1 at 12. However, Husky states in its response to Defendants' motion
 15 to dismiss that it is no longer pursuing a claim for breach of an implied contract. Dkt. 14
 16 at 12. In support of its claim for breach of the express contract, Husky asserts in its
 17 response that the Contract "does not specifically reserve to Navistar a right to sell to a
 18 DealCor dealer or any other dealer for resale to the state or local government or for the
 19 dealer not to act fairly." *Id.* at 14. Next, Husky argues that the Contract "does not reserve
 20 to Navistar a right to discriminate in price or allowances nor to act arbitrarily." *Id.*
 21 Finally, Husky objects to Defendants' request that the Contract claims against Cascadia
 22 be dismissed because Husky has not seen the terms of the agreement between Navistar
 23 and Cascadia and argues that it "may be a third-party beneficiary to those claims." *Id.* at
 24 14-15.

25 Defendants maintain that the Contract provides Navistar with the unconditional
 26 right to compete and specifically states that Navistar may sell its trucks to "(a) Navistar-
 27 owned retail outlets wherever located; and (b) Other dealers of Navistar wherever
 28 located." Dkt. 16 at 17 (quoting Dkt. 11-2 at 10). Thus, according to Defendants, a duty
 of good faith cannot be applied to minimize these unconditional rights. Dkt. 16 at 17 & n.

16. Next, Defendants assert that the Contract allows Navistar complete discretion to set
 17 the prices paid by Husky, and therefore, the Contract bars Husky's claim that Navistar is

1 required to provide equal SPAs or pricing to dealers of its trucks. *Id.* at 17 (citing Dkt.
 2 11-2 at 4 which states “Prices, discounts and terms applying to the goods ordered by the
 3 Dealer shall be those established by Navistar”). Finally, Defendants argue that Husky’s
 4 “course of dealing” and “context rule” arguments do not change the fact that the express
 5 terms of the contract control and that those terms explicitly provide Navistar the
 6 unconditional right to compete and “unfettered pricing discretion.” *Id.*

7 The Court concludes that Defendants’ motion to dismiss Husky’s Contract claims
 8 should be granted. First, although a good portion of Husky’s response to the motion to
 9 dismiss discusses the “context rule,” Husky never states what terms in the Contract it
 10 asserts would require using extrinsic evidence in their interpretation. The terms of the
 11 Contract at issue are clear. Although Husky appears to argue that it had a different intent
 12 in forming the Contract than Navistar, such a subjective intention is irrelevant where, as
 13 here, the intention of the parties can be determined by the actual words used in the
 14 Contract. *See Hearst*, 154 Wn. 2d at 503-04. As asserted by Defendants, the express
 15 terms of the Contract allow Navistar to sell its trucks to any dealer and to establish prices,
 16 discounts, and terms that apply to the goods ordered by Husky. Dkt.11-2 at 4, 10.
 17 Moreover, the Court concludes that Husky cannot assert a contract claim against Cascadia
 18 based on the possibility that Husky is somehow a third-party beneficiary to claims based
 19 on the agreement between Cascadia and Navistar. Therefore, the Court concludes that
 20 Defendants’ motion to dismiss is granted as to Husky’s Contract claims.

21 **E. Dismissal with Prejudice**

22 Defendants assert that if the Court grants their motion to dismiss, such dismissal
 23 should be with prejudice because any amendment of Husky’s complaint would be futile.
 24 Dkt. 10 at 19 (citing *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1039 (9th Cir. 2002)).
 25 Defendants maintain that Husky’s complaint cannot be amended to allege: (1) that
 26 Defendants’ conduct constituted an unfair or deceptive act or practice that has the
 27 capacity to deceive a substantial portion of the public; or (2) that Navistar and Cascadia

1 conspired in restraint of trade or that a sale took place between the two companies
2 because Cascadia is a wholly-owned subsidiary of Navistar; or (3) that Cascadia breached
3 a contract as there is no contract between Cascadia and Husky or that Navistar's pricing
4 breached its Contract with Husky because the Contract does not restrict Navistar's ability
5 to set prices to Husky. Dkt.10 at 19-20.

6 Husky did not respond to Defendants' request that dismissal be with prejudice.
7 *See generally* Dkt. 14. Based on Husky's lack of response (*see* Local Rule CR 7(b)(2))
8 and the Court's agreement with Defendants that any amendment to Husky's complaint to
9 attempt to support its current claims against Defendants would be futile, the Court
10 concludes that dismissal in this action should be with prejudice.

11 IV. ORDER

12 Therefore, it is hereby **ORDERED** that Defendants' motion to dismiss (Dkt. 10) is
13 **GRANTED** and this action is **DISMISSED with prejudice**.

14 DATED this 14th day of October, 2010.

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BENJAMIN H. SETTLE
United States District Judge